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In The
Supreme Court of the United States

DORA B. SCHRIRO, Director,
Arizona Department of Corrections,

Petitioner,

v.

WARREN WESLEY SUMMERLIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF NEBRASKA, ALABAMA, COLORADO, DELAWARE, FLORIDA, ILLINOIS, INDIANA, MONTANA, NEVADA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF AMICI INTEREST

The State of Nebraska and the 15 amici states have a strong interest in this Court reversing the opinion of the United States Court of Appeals for the Ninth Circuit in this case for the following reasons.

- The 9th Circuit opinion adopts and employs an interpretation of state law in direct conflict with a ruling of that state's highest court upon the identical question. The amici states have a strong interest in having their highest courts respected as the final arbiters of the meaning of their state statutes, consistent with established concepts of federalism.

- The amici states have a very strong interest in preserving the ability of their legislatures to define the behaviors that will be deemed criminal within their respective borders. The 9th Circuit opinion claims that this Court "redefined" a crime under Arizona statutes in *Ring v. Arizona*, 536 U.S. 584 (2002). The amici states desire a clear statement that federal courts are not free to redefine substantive criminal statutes contrary to specific rulings of that state's highest court.

- Because of the disruptive impact upon state criminal justice systems of granting retroactivity to newly announced rules of federal constitutional law, the amici states have a significant interest in seeing that new rules of federal constitutional law are applied retroactively only in the very limited instances anticipated by *Teague v. Lane*, 489 U.S. 288 (1989).

- The defense bar is already raising a second generation of Sixth Amendment arguments based upon *Ring*, not only in former judge-sentencing states but in states which have historically employed juries to resolve questions of penalty. Many of these claims are arising in the context of collateral attacks upon otherwise final

judgments of conviction. The amici states desire a clear statement that the holding in *Ring* is not to be given retroactive application in order to apply the rule in *Ring* only in appropriate cases.

- Nebraska and other states which had employed judicial sentencing in capital cases prior to *Ring* had for decades conducted potential capital cases to final judgment in good faith reliance upon this Court's holdings in *Profitt v. Florida*, 428 U.S. 242 (1976), and *Walton v. Arizona*, 497 U.S. 639 (1990). It would be a significant detriment to the states' interest in accurate fact finding, justice, society's perception of justice, and the finite resources of state legal systems, if cases tried and affirmed on direct review in reliance upon *Proffit* and *Walton* were now required to be re-opened, possibly decades after the crime in question.

- The finality of judgments is a significant aspect of the system of justice these states desire to provide their citizens. The 9th Circuit's position in this case unnecessarily erodes that legitimate legal and societal goal.

ARGUMENT

I. A federal court is not free to ignore the rulings of a state's highest court, make up its own interpretation of state statutes, and then evaluate that new interpretation of state law against the requirements of our federal constitution. Respect for the rulings of a state's highest court on questions of state law is one of the fundamental concepts of federalism.

A.

The amici states have a strong interest in having their highest courts be the final arbiters of the meaning of their

state statutes. The 9th Circuit majority's analysis of whether this Court's ruling in *Ring v. Arizona*, 536 U.S. 584 (2002) should be given retroactive application to otherwise final criminal judgments ignores that fundamental principle of federalism.

In its attempt to distinguish the Sixth Amendment right recognized in *Apprendi v. New Jersey,* 530 U.S. 466 (2000) from the Sixth Amendment right applied to capital cases in *Ring*, the 9th Circuit majority begins by taking upon itself a responsibility reserved to the states by our federal form of government. It takes upon itself the responsibility to impose upon state statutes a meaning contrary to the meaning given those same statutes by that state's highest court. The 9th Circuit majority asserts:

> In *Ring* . . . the substantive basis of Arizona's capital murder regime was at issue, so much so that *Ring* restored as a matter of substantive law the pre-*Walton* capital murder paradigm in Arizona.

341 F.3d at 1107.

In stark contrast, the Arizona Supreme Court, in *State v. Towery*, 204 Ariz. 386, 392, 64 P.3d 828, 834 (2003), had previously reached exactly the opposite conclusion with respect to the proper interpretation of Arizona statutes following *Ring*.

> [*Ring*] changed neither the underlying conduct that the state must prove to establish that a defendant's crime warrants death nor the state's burden of proof; it affected neither the facts necessary to establish Arizona's aggravating factors nor the state's burden to establish the factors beyond a reasonable doubt. Instead, [*Ring*] altered

> who decides whether any aggravating circumstances exist, thereby altering the fact-finding procedures used in capital sentencing hearings.

It is not the place of a federal court to substitute its judgment, upon a question of state statutory interpretation, for that of the highest court of that state. As this Court stated in *Johnson v. Fankell*, 520 U.S. 911, 916 (1997): "Neither this Court nor any other federal tribunal has any authority to place a construction upon a state statute different from the one rendered by the highest court of the State." *See also*, *Gurley v. Rhoden,* 421 U.S. 200, 208 (1975) ("[A] state's highest court is the final judicial arbiter of the meaning of state statutes."); and *City of Chicago v. Morale*s, 527 U.S. 41, 41 (1999).

Yet the 9th Circuit majority engaged in exactly that forbidden act here and the product of that act became the lynchpin of that court's erroneous conclusions regarding *Ring* retroactivity.

B.

The pragmatic specter which hangs over this situation is this: If the 9th Circuit majority is correct in their approach, then the legal system of this country could be routinely confronted with *two* radically different interpretations of state law existing simultaneously in parallel universes–one state, one federal.

"[T]he decision of a federal court (even this Court) on a question of state law is not binding on state tribunals."

Leavitt v. Jane L., 518 U.S. 137, 146 (1996) (Stevens, J., dissenting).[1]

> To be sure, we do not normally grant petitions for certiorari solely to review what purports to be an application of state law; but we have done so, [citations omitted] and undoubtedly should do so where the alternative is allowing blatant federal-court nullification of state law.

Leavitt v. Jane L., 518 U.S. 137, 144-145 (1996).

The potential for mischief, misunderstanding and confusion are limitless if federal courts are free to ignore clear interpretations of state law by a state's highest court and create and employ their own divergent interpretations of that state's law.

C.

The 9th Circuit majority attempts to rationalize its ability to ignore the Arizona Supreme Court's ruling in *Towery*, by alleging that *Towery* was really an interpretation of federal law, not state law.[2] However, that assertion ignores the very first inquiry required by an appropriate retroactivity analysis. The first question that must be answered is: Was the statutory definition of the state crime or the facts relevant to that crime's punishment altered by *Ring*? For that answer, the circuit court was

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[1] *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) (State courts are not bound by a circuit court's interpretation of federal law, much less state law.)

[2] 341 F.3d at 1106-1107.

obliged to honor that portion of the *Towery* opinion which defines the current state of post-*Ring* Arizona law.

Just as a federal court is not bound by a state court's interpretation of federal law, by the same token a federal court is not free to ignore a state's highest court's pronouncement of state law when measuring state law against the requirements of our federal constitution. Yet that is exactly what the 9th Circuit majority did in this case. The 9th Circuit majority (1) ignored the state law holdings of the Arizona Supreme Court in *Towery*, (2) made up its own version of the substantive law of Arizona, and (3) then applied federal retroactivity standards to its alternative version of Arizona law.

D.

In sharp contrast to the process employed by the 9th Circuit majority below, in deciding *Ring* this Court began it's Sixth Amendment analysis by *relying on* the Arizona Supreme Court's interpretation of the Arizona statutes in question.[3]

[3] "Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment. See 200 Ariz. at 279, 25 P.3d at 1151 (citing Ariz.Rev.Stat. § 13-703) This was so because in Arizona, a 'death sentence may not legally be imposed . . . unless at least one aggravating factor is found to exist beyond a reasonable doubt.'" 200 Ariz. at 279, 25 P.3d at 1151 (citing Ariz.Rev.Stat. § 13-701). 536 U.S. at 597.

Even the 9th Circuit majority relied upon the Arizona Supreme Court's interpretation of Arizona law when it served their purpose.[4]

E.

These states have a strong interest in preserving the power of their highest courts to articulate the meaning of their state statutes, and to have those holdings respected by the federal courts. Thus, the fact that the 9th Circuit majority ignored that fundamental concept of federalism in resolving this case is particularly distressing to these states.

II. The Sixth Amendment guarantees a criminal defendant a particular fact finder. The Sixth Amendment does not define the fact which state law may require that fact finder to consider.

These states have a very strong interest in preserving the ability of their legislatures to define the behaviors that will be deemed criminal within their respective borders.

[4] "[T]he Arizona Supreme Court declared the Arizona death penalty statute to be unconstitutional under the Eighth and Fourteenth Amendments. [citation omitted] The Arizona court acknowledged, after examining the structure of the relevant Arizona criminal statutes, that the Supreme Court, through *Furman*, had 'abolished "capital offenses" in Arizona' substantively." 341 F.3d at 18.

A. The federal courts are not empowered by our federal constitution to either "define" or "redefine" the behavior which a state may deem to be criminal or which merits enhanced criminal sanction. That responsibility rests solely with state legislatures.

In *United States v. Buckland*, 289 F.3d 558 (9th Cir.) (*en banc*), *cert.den.*, 535 U.S. 1105 (2002), the 9th Circuit accurately concluded that this Court's ruling in *Apprendi* was procedural in nature and thus not entitled to retroactive application. The 9th Circuit majority argues that *Ring* can be distinguished from *Apprendi* because *Ring* resulted in "redefining elements of an offense" while *Apprendi* did not.[5] At the outset, that is simply not a correct assessment of what this Court accomplished in *Ring*.

However, of greater concern to these states is this: The 9th Circuit majority's proposition asserts that our federal constitution generally, and the Sixth Amendment specifically, somehow empowers the federal courts to "redefine" a state crime. We believe that to be a fundamentally flawed statement of the relationship between the federal courts and the power of the states to define criminal behavior.

This Court's opinion in *Ring* neither defined nor "redefined" the punishment-enhancing aggravating circumstances enacted by the Arizona Legislature.

[5] 341 F.3d at 17.

B. Nothing in Arizona law was "redefined" by *Ring*.

In *Apprendi,* the punishment-enhancing behavior treated as a functional element of the offense was the "hate crime" aspect of the New Jersey statute. There appears to be agreement that *Apprendi* did not alter the state statutory definition of the *behavior* that would establish that punishment-enhancing fact under New Jersey law.

In *Ring*, statutory aggravating circumstances defined by the Arizona Legislature were the punishment-enhancing facts upon which the inquiry focused. Again in *Ring,* this Court did not alter the definition of a single statutory aggravating circumstance as articulated by Arizona statutes.[6] *Ring* is identical to *Apprendi* in that dispositive respect.

Our analysis here should be focused upon this question: Was any statutorily defined behavior, required to be found in order to expose a guilty defendant to enhanced punishment, altered in its definition by this Court's opinion in *Ring*?

In *Apprendi,* this Court stated:

> *The substantive basis for New Jersey's enhancement is thus not at issue*; the adequacy of New Jersey's procedure is. The strength of the state interests that are served by the hate crime legislation has no more bearing on this procedural

[6] Nor has the State of Arizona altered the definition of its aggravating circumstances as a result of this Court's ruling in *Ring*.

> question than the strength of the interest served by other provisions of the criminal code.

530 U.S. at 475 (emphasis added).

The 9th Circuit majority not only admits, but founds its argument upon, the fact that *Apprendi* did not alter the definition of the punishment-enhancing fact selected by the New Jersey Legislature.[7] We agree with that conclusion. Yet the 9th Circuit majority utterly fails to call to our attention one specific punishment-enhancing fact, defined by the Arizona Legislature, which was "redefined" by this Court's opinion in *Ring*.[8] They fail to do so because it did not happen.[9]

Oddly enough, the 9th Circuit majority opinion later confirms the fact that Arizona's punishment-enhancing facts were not "redefined" by this Court's decision in *Ring* when it finds the first of the *Teague* exceptions not applicable. "Because *Ring* did not 'decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons,' [citation omitted] the first exception is inapplicable to [Summerlin]." 341 F.3d at 1109. That accurate assessment of the impact of *Ring* upon substantive Arizona law should have ended the inquiry required here.

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[7] 341 F.3d at 17, fn 9.

[8] The majority opinion's historical survey of Arizona death penalty law cannot obscure the fact that, in the end, this Court's ruling in *Ring* did not alter the definition of a single, current statutory aggravating circumstance under Arizona law. *See*, 341 F.3d at 18-21.

[9] The majority opinion's reference to *Ring*, 536 U.S. 589-590 (341 F.3d at 1102) in Footnote 9 offers no enlightenment with respect to that alleged distinction.

C. *Apprendi* and *Ring* accomplish exactly the same Sixth Amendment goal.

Apprendi and *Ring* placed exactly the *same* requirements upon both the New Jersey and Arizona penalty phase process, and those requirements were wholly procedural. The Sixth Amendment entitles every criminal defendant to have every guilt-creating or punishment-enhancing fact submitted to a jury. *Ring* in particular teaches that the nature of the punishment is irrelevant to that Sixth Amendment concern. The Sixth Amendment guarantee does not hinge upon whether a finding of fact exposes the defendant to lengthier incarceration or exposes the defendant to the possibility of death. The Sixth and Fourteenth Amendments mandate that a particular level of *process* be provided by the states with respect to *every* fact which operates as a "functional element" of a criminal offense.

Neither *Apprendi* nor *Ring* are observed to tinker with the state-defined, punishment-enhancing facts in question. The Sixth Amendment guarantees a criminal defendant a certain fact *finder*. The Sixth Amendment has no interest in the "definition" of the fact which state law may require to be found. *Apprendi* and *Ring* are, and should continue to be read as, strictly Sixth Amendment cases.

D. *Bousley v. United States* supports Arizona's position in this case.

Although relied upon by the 9th Circuit majority, this Court's opinion in *Bousley v. United States*, 523 U.S. 614, 617-621 (1998), supports Arizona's position that the rule announced in *Apprendi* and applied to capital cases in

Ring is properly classified as procedural rather than substantive. In *Bousley*, a prior ruling of this Court[10] had significantly narrowed a penalty-enhancing element by narrowing the definition of the behavior which exposed a guilty defendant to enhanced punishment *for a federal crime*, thus removing certain behavior from the risk of enhanced punishment.[11] In so doing, this Court performed the same interpretive function with respect to a federal statute which a state's highest court properly performs with respect to state statutes.

In clear contrast to the situation in *Bousley*, this Court did not redefine, much less narrow, the punishment-enhancing behavior described in the New Jersey and Arizona statutes at issue in either *Apprendi* or *Ring*. Furthermore, the change from judicial to lay fact finders required by *Apprendi/Ring* cannot be reliably determined to significantly enhance "the likelihood of an accurate conviction."[12] Therefore, as this Court held in *Boulsey*, "there is no reason to apply the rule retroactively on habeas review."[13]

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[10] *Bailey v. United States*, 516 U.S. 137 (1995)

[11] 523 U.S. at 617.

[12] 523 U.S. at 620. See also, 341 F.3d 1129-1130 (Rawlinson, Circuit Judge, dissenting.) and Argument IV.B below.

[13] 523 U.S. at 620.

III. The significant disruptive impact of retroactive application of new rules of federal constitutional law upon the states supports the conclusion that the very narrow exceptions of *Teague* should be honored, not expanded.

A. The States' interest

The amici states have a significant interest in seeing that new rules of federal constitutional law announced by this Court are applied retroactively only in the very limited instances required by *Teague v. Lane*, 489 U.S. 288 (1989).

These states have a significant interest in the proper classification of this Court's decision in *Ring* as that classification will impact final judgments not only in capital cases, but other criminal judgments of their courts. As this Court has recognized, the cost to the states of affording retroactive application of new rules of federal constitutional law is significant. Retroactivity consumes time and drains finite state resources. More importantly, retroactivity conflicts directly with the desire of the states, their citizens and American society in general to achieve the finality of criminal judgments. *Sawyer v. Smith*, 497 U.S. 227, 222 (1990).

B. A question of time and timing

Capital cases, although relatively few in number, are highly visible and therefore the cases from which citizens routinely draw their impressions of this nation's criminal justice system. *Ring* offers a perfect example of the pragmatic and societal concerns that these states and their citizens have with retroactivity.

Litigation attempting to bring a capital judgment to closure moves at a glacial pace in this country. The criminal judgment presently before this court is over twenty years old.[14] Yet it is the affirmative responsibility of these states to afford a criminal defendant a constitutional trial under the law in effect *at the time of trial*, not at some hypothetical date two or more decades in the future. It is not, and cannot rationally be, the responsibility of these states to provide a criminal defendant a trial satisfying future decisions of this Court announcing new rules of federal constitutional law. This reality is clearly reflected in the two very narrow exceptions allowing retroactivity articulated by *Teague v. Lane*, 489 U.S. 288 (1989).

The 9th Circuit majority does not dispute that Ring was constitutionally tried at a time when *Proffitt v. Florida*, 428 U.S. 242 (1976) and subsequently *Walton v. Arizona*, 497 U.S. 639 (1990) were unequivocal in their approval of judicial fact finding in the penalty phase of a potential capital trial. *Teague* envisions only the most extraordinary of new rules would require states to abandon a twenty-year-old judgment and attempt to begin again.[15] *Ring* is not such a ruling.

[14] The judgment in Nebraska's oldest active capital case is also over twenty years old.

[15] *Tyler v. Cain*, 533 U.S. 656, 667, fn7 (2001) ("[I]t is unlikely that any of these watershed rules "ha[s] yet to emerge." *Sawyer, supra,* at 243, 110 S.Ct. 2822 (quoting *Teague, supra,* at 313, 109 S.Ct. 1060 (plurality opinion)); *see also Graham, supra,* at 478, 113 S.Ct. 892.")

C. *Apprendi* and *Ring* are both procedural. Eighth Amendment concerns do not distinguish these holdings.

Apprendi announced the Sixth Amendment rule in question in a non-capital case. However, this Court made clear the new Sixth Amendment constitutional rule announced impacted only procedural aspects of the penalty phase proceeding. "The strength of the state interests that are served by the hate crime legislation has no more bearing on this *procedural question* than the strength of the interest served by other provisions of the criminal code." 530 U.S. at 475 (emphasis added). The rule announced in *Apprendi* has uniformly been found to be procedural in nature.[16]

In *Ring*, a capital case, the question presented was this:

[16] *Sepulveda v. United States*, 330 F.3d 55 (1st Cir. 2003); *Coleman v. United States*, 329 F.3d 77 (2d Cir. 2003); *United States v. Swinton*, 333 F.3d 481 (3rd Cir. 2003); *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001); *United States. v. Brown*, 305 F.3d 304 (5th Cir. 2002); *Goode v. United States*, 305 F.3d 378 (6th Cir. 2002); *Dellinger v. Bowen*, 301 F.3d 758 (7th Cir. 2002); *United States v. Moss*, 252 F.3d 993 (8th Cir. 2001); *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002); *United States v. Mora*, 293 F.3d 1213 (10th Cir. 2002); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001).

State v. Sepulveda, 201 Ariz. 158, 32 P.3d 1085 (Ariz.App. 2001); *Boyd v. State*, WL 22220330 (Ala.Crim.App. 2003) (not yet released for publication); *People v. Bradbury*, 68 P.3d 494 (Colo.Sup.Ct. 2003); *Figarola v. State*, 841 So.2d 576 (Fla.App. 2003); *People v. Gholston*, 332 Ill.App.3d 179, 772 N.E.2d 880, 265 Ill.Dec. 509 (2002); *Whisler v. State*, 272 Kan. 864, 36 P.3d 290 (2001); *Meemken v. State*, 662 N.W.2d 146 (Minn.App. 2003); *State v. Tallard*, 816 A.2d 977 (N.H. 2003); *State v. Hunt*, 582 S.E.2d 593 (N.C. 2003); *Teague v. Palmateer*, 184 Or.App. 577, 57 P.3d 176 (2002).

> [Whether an] aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury.

536 U.S. at 597.

This Court answered that question as follows: "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' *Apprendi*, 530 U.S., at 494, n. 19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury." 536 U.S. at 609.

In *Ring*, this Court observed, "We see no reason to differentiate capital crimes from all others in this [Sixth Amendment] regard." 536 U.S. at 607.

Directly contrary to that reasoning, the 9th Circuit majority attempts to place an Eighth Amendment gloss upon the purely Sixth Amendment question presented here – an Eighth Amendment gloss that this Court had affirmatively stripped away only a year before in *Ring*. The 9th Circuit majority's attempt to resurrect an Eighth Amendment distinction between the Sixth Amendment right announced in *Apprendi* and the Sixth Amendment right applied to capital cases in *Ring* is inconsistent with this Court's reasoning and holdings in both *Apprendi* and *Ring*.

IV. The procedural change required by *Apprendi/Ring* does not fall within either of the *Teague* exceptions.

A. No behavior decriminalized

No punishment-enhancing behavior defined by Arizona's statutory aggravating circumstances was decriminalized by *Ring*.[17]

B. Juries cannot be shown to seriously enhance the accuracy of fact finding at any trial.

Although this Court noted in *Ring* that the question of whether judges are the better fact finders "is far from evident,"[18] one need not look beyond the O.J. Simpson verdict for evidence that juries are equally suspect.

We also cannot allow the 9th Circuit majority's analysis to distract us from the fact that *Apprendi* and *Ring* are Sixth Amendment cases, not Eighth Amendment cases. On this issue, again, the 9th Circuit majority attempts to reapply an Eighth Amendment gloss to capital penalty phase decision making which *Ring* specifically stripped away.[19]

The Sixth Amendment's guarantee of right to jury trial was not motivated by, and its application does not turn upon, the relative *accuracy* of jury fact finding. "The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential

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[17] 341 F.3d at 1109.

[18] 536 U.S. at 607.

[19] 341 F.3d at 1109-1110.

factfinders." *Ring,* 536 U.S. at 607. That said, it is odd indeed for the 9th Circuit majority to make its *Teague* analysis of *Ring* turn upon the highly debatable concept of jurors as remarkably superior fact finders.

It was not enhanced accuracy, but our evolving understanding of the Sixth Amendment's guarantee of trial by jury which produced *Apprendi* and *Ring*. Neither *Apprendi* nor *Ring* assure guilty defendants they will get a more accurate evaluation of the punishment-enhancing behavior in question by a jury. Instead, these defendant's are simply told they cannot be denied their Sixth Amendment right to have a jury consider that question, *if the defendant desires it.*

The 9th Circuit majority simply proffers its opinion, buttressed by nothing in this record, that juries are by far the more accurate fact finders.[20] As the dissent points out, there currently exists no dispositive answer to the jury accuracy question in legal precedent, scholarship or in the minds of the public.[21] Although the motivation of some research on this subject may be suspect, one should not ignore research that argues lay juries are inconsistent and generally confused about their role in complex cases. Some of the research focuses specifically on the inability of juries to understand the instructions presented them in capital cases.[22]

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[20] 341 F.3d at 1109-1110.

[21] 341 F.3d at 1120-1130 (Rawlins, Circuit Judge, dissenting.)

[22] There is little research on the consistency of judicial sentencing. *See* Robin Lutz, *Experimenting with Death: An Examination of Colorado's Use of the Three-Judge Panel in Capital Sentencing*, 73 U. Colo. L. Rev. 227 (2002). Most of the research focused on the ineffectiveness or inability of juries to understand the instruction. *See* David C. Baldus,

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Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999), 81 Neb. L. Rev. 757 (2002); William J. Bowers, et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision-Making*, 83 Cornell L. Rev. 1476 (1998); William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043 (1995); Fred B. Burnside, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 Wis. L. Rev. 1017; Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 Fordham L. Rev. 21 (1997); Scott E. Erlich, *The Jury Override: A Blend of Politics and Death*, 45 Am U. L. Rev. 1403 (1996); Craig Haney & Mona Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments*, 21 L. & Hum. Behav. 575 (1997); Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 L. & Hum. Behav. 411 (1994); Patrick E. Higginbotham, *Juries and the Death Penalty* 41 Case W. Res. L. Rev. 1047 (1991); Joseph L. Hoffmann, *Where's the Buck? – Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 Ind. L.J. 1137 (1995); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 Va. L. Rev. 311 (2003); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 Ind. L.J. 1161 (1995); James Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial: Focus on Mitigating Circumstances*, 16 L. & Hum. Behav. 203 (1992); Robin Lutz, *Experimenting With Death: An Examination of Colorado's Use of the Three-Judge Panel in Capital Sentencing*, 73 U. Colo. L. Rev. 227 (2002); Michael A. Mello, *Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes That Divide Sentencing Responsibility Between Judge and Jury*, 30 B.C. L. Rev. 283 (1989); Katheryn K. Russell, *The Constitutionality of Jury Override in Alabama Death Penalty Cases*, 46 Ala. L. Rev. 5 (1994); David A. Scheffel, *Harris v. Alabama – A Portrait of Deference to the States in Capital Punishment*, 19 T. Jefferson L. Rev. 39 (1997); Robert F. Schopp, *Reconciling "Irreconcilable" Capital Punishment Doctrine as Comparative and Noncomparative Justice*, 53 Fla. L. Rev. 475 (2001); Richard L. Wiener, et al., *Comprehensibility of Approved Jury Instruction in Capital Murder Cases*, 80 J. App. Psychol. 455 (1995); Richard L. Wiener, *Death Penalty Research in Nebraska: How Do Judges and Juries Reach Penalty Decisions?*, 81 Neb. L. Rev. 757 (2002); Richard L.

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C. The interest of the amici states

The interest of these states is to preserve a legitimate latitude in their public policy decision making. Beyond the requirements of our federal constitution exists the realm of legitimate public policy debate and action. We believe that, in situations not governed by the Sixth Amendment, it should be left to the states to determine the respective roles they desire their judiciary and lay jurors to play as fact finders in capital and non-capital trials alike.[23]

V. The risk of *Ring* retroactivity upon presently established law.

A. Is *Apprendi* also retroactive?

Because the erroneous distinctions conjured by the 9th Circuit majority do not effectively distinguish *Ring* from *Apprendi,* the amici states note our concern that if *Ring* is ultimately given retroactive application the uniform body of law presently holding *Apprendi* not to be retroactive[24] must also be in jeopardy. The impact of the reversal of that uniform body of non-capital law would have a much greater disruptive impact upon our state and federal criminal justice systems than would the capital

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Wiener, et al., *The Role of Declarative and Procedural Knowledge in Capital Murder Sentencing*, 28 J. App. Soc. Psychol. 124 (1998).

[23] For example, the State of Nebraska, in response to *Ring,* modified its first degree murder penalty phase process to provide that a jury will determine the existence of alleged statutory aggravating circumstances and a panel of three judges will complete the statutory sentencing analysis if a jury finds a defendant "death eligible". Neb.Rev.Stat. § 29-2519 *et. seq.*

[24] See footnote 6, above.

question currently before us. That result would expose untold numbers of both state and federal cases to what these states believe would be unnecessary re-litigation.

We observe no principled way to distinguish the Sixth Amendment right applied to potential capital cases in *Ring* from the Sixth Amendment right recognized by this court in Apprendi.

B. *Ex post facto* law

The similarities between the language employed by this Court in describing the distinctions between the concepts of "procedural" and "substantive" in the context of the Ex Post Facto Clause will also be called into question if the 9th Circuit majority's holding is upheld.

In *Dobbert v. Florida*, 432 U.S. 282 (1977), this Court found that the retrial of the penalty phase in a potential capital case did not violate the Ex Post Facto Clause even when the Florida Legislature, in response to *Furman v. Georgia*, 408 U.S. 238 (1972), *created* that state's aggravating circumstances between the date of Dobbert's crime and his trial.

In *Dobbert*, this Court classified the legislative *creation* of aggravating circumstances as being procedural in nature, and therefore their application to a crime which preceded their creation did not violate the Ex Post Facto Clause.[25] Yet here the 9th Circuit majority concluded that the application of the *very same* aggravating circumstances that

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[25] 432 U.S. at 293-294.

existed at both the time of the murder and at the time of trial somehow represented a "substantive" change in Arizona law requiring retroactive application of *Ring*. We do not see how the 9th Circuit majority's rationale can be allowed to stand without also exposing nearly thirty years of law under *Dobbert* to question.

As this Court noted in *Collins v. Youngblood*, 497 U.S. 37, 51-52 (1990): "The right to jury trial provided by the Sixth Amendment is obviously a 'substantial' one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the *Ex Post Facto* Clause."

VI. A second generation of *Ring* claims are already being litigated in the state courts.

The defense bar is already raising a second generation of Sixth Amendment arguments based upon *Ring*, not only in former judge-sentencing states but in states which have historically employed juries to resolve questions of penalty. Many of these claims are arising in the context of collateral attacks upon otherwise final judgments of conviction.[26]

This Court specifically holding *Ring* not to be retroactive would significantly reduce the number and types of

[26] *Goodin v. State*, 2003 WL 21805386, *7 (Miss. 2003) (state postconviction proceeding attempting to raise a *Ring*-based claim under *Atkins v. Virginia*, 536 U.S. 304 (2002)); *Russell v. State*, 849 So.2d 95, 146 (Miss. 2003) (same); *West v. State*, 2003 WL 22220502, *1 (Ala.Crim.App. 2003) (postconviction action alleging indictment against prisoner was fatally defective under *Ring* because it did not identify any aggravating circumstances).

cases in which the state courts should legitimately consider such arguments.

CONCLUSION

The amici states urge this Court to reverse the decision of the 9th Circuit Court of Appeals and specifically hold that this Court's ruling in *Ring* is not to be given retroactive application to final criminal judgments being considered on collateral review.

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